Award No. 11239
Docket No. TD-13174

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Pennsylvania Railroad Company, (hereinafter referred to as "the Carrier"), violated, and continues to violate, the schedule agreement between the parties, Part I, Scope, thereof in particular when, beginning prior to September 21, 1959, and continuing thereafter, it required and permitted employes not within the Scope of the Agreement to perform work covered thereby.

(b) Carrier shall now be required to compensate the individual claimants identified in Exhibit TD-1 appended to and made a part of this submission one day's compensation at pro rata rate of train dispatcher for the dates specified in said Exhibit, and

(c) Thereafter and until the said violation is terminated Carrier shall compensate the senior eligible extra train dispatcher one day's compensation at pro rata rate of train dispatcher on each trick and for each successive day.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties, copy of which is on file with this Board, and the same is made a part of this submission as though fully set out herein.

At the time the instant dispute arose the Scope Rule of Part I thereof, here involved, provided:

"SCOPE

"(Effective July 1, 1950) The provisions set forth in Part I of this Agreement shall constitute an Agreement between The Pennsylvania Railroad Company and its Train Dispatchers, represented by the American Train Dispatchers Association, and shall govern the hours of service, working conditions and rates of pay of the respective positions and employes classified therein.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employes, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all of the same.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute between The American Train Dispatchers Association and The Pennsylvania Railroad Company.

Prior to September, 1959, the Carrier reassigned several portions of its track. After the reassignment the control was not under the direction of the Train Dispatchers. The Claimants bring this claim alleging a violation of the Scope Rule.

The following track was reclassified:

"1. NY and Zane,

2. NY and UN,

3. the Brownsville Running Track,

4. the Alexandria Branch,

5. the Turtle Creek Branch east of BY

6. No. 1 track 100 feet east of Mile Post 40 to Wood on the Bald Eagle Branch and

7. No. 3 track CR to 2021 feet north of Mile Post 10.

We must first determine, if by agreement, the Carrier has precluded itself from the right to reclassify portions of its track. We are unable to discern any clause in the Agreement which limits the rights of the Carrier in this respect. We do believe that the reclassification must be reasonably justified and made in good faith. The good faith of the Carrier or the reasonableness of the reclassification of track is not challenged or contested in the record.

After the reclassification of track, the work is certainly of a different character. It no longer is work which is customarily performed by Train Dispatchers. We must now determine if by custom and practice on the system, the work belongs to Train Dispatchers. The Scope Rule is general in character. Therefore, we must rely upon the custom and practice upon the system. The burden of proof is upon the Petitioner. We find no evidence in support thereof.

We reiterate, that although the Carrier has the right to reclassify it's track, it must be done in good faith and for reasonable cause, not upon whim or fancy.

For the foregoing reasons, we believe the Agreement was not violated.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1963.

LABOR MEMBER'S DISSENT TO AWARD 11239 DOCKET TD-13174

The holding of the majority in Docket TD-13174 evidences a shocking, incredible and incomprehensible disregard of the clear and unambiguous Statement of Claim, the issues clearly stated in the record, the evidence, and long-established principles adhered to for many years by this Board and set out in the record with ample citation of authority. Any supportable appraisal of Award 11239 inevitably leads to one of two conclusions: (a) that it is predicated upon careless, perfunctory, slovenly, slipshod, puerile and almost infantile regard for what the record states, or (b) that is but one more of all too many examples of outright ineptness or stupidity. Either conclusion adds up to a palpably erroneous Award whose only possible claim to virtue is brevity. What is offered as substance in respect to the issues is confined to no more than three paragraphs. For this Board to dispose of this extensive record, even though incorrectly, is clearly indicative of the preposterous disregard for what the record sets out, even assuming that record was examined with minimal application and conscientiousness.

The Award utterly fails to meet and pass upon the clear issues, settles nothing, and is completely devoid of precedent value.

The Statement of Claim clearly and unambiguously avers as the basis thereof that the Carrier "required and permitted employes not within the Scope of the Agreement to perform work covered thereby." The issue presented, as the claim and the whole record makes unmistakably clear, is whether the work incident to directing the movement of trains over certain tracks is within the scope of the Agreement and if so whether any such work was delegated to employes outside the Scope of the Agreement before the Board.

The record is clear and undisputed — indeed, the parties expressly agree in their Joint Statement of Facts prepared on the property — that prior to the date changes were made in the classification of certain tracks they were "in charge of and under the jurisdiction of Train Dispatchers located at Pittsburgh." The record is also clear, as evidenced by the instructions of the Carrier, some of the tracks in question were delegated to the jurisdiction of employes not within the Scope of the Agreement. Hence, the Referee's obsrvation that "after the reassignment the control was not under the direction of the Train Dispatchers" can scarcely be regarded as either original or learned thinking. Nor is the Referee's observation that after the tracks were reclassified "the work is certainly of a different character" in any manner correct. To the contrary it is palpably eroneous. The record makes it clear that the issue concerns the responsibility for directing train movements, and that work is demonstrably the same irrespective of what the tracks may be called. The record cites abundant authority in support of the Employes' position that it is the character of the work and not the method of performing it which controls; and, further, that a party to a contract, the Carrier in this instance cannot effect indirectly that which it is prohibited from doing indirectly. Likewise, the Referee is incorrect in stating that it must be determined what the custom and practice is. In this instance, the Carrier itself agrees that prior to the dates in question these tracks were under the jurisdiction of the claimant employes. And its own instructions disclose that it delegated that jurisdiction to others. Hence, the record supplies the information by the Carrier's own admission. And certainly, pursuant to authority cited, work which, as here, has been historically, customarily and traditionally performed by a class or craft of employes is their exclusive work, and this Board has so held times almost without number.

The holding of the majority completely ignores the precise issue so clearly posed by the record. Likewise it stupidly ignores the undisputed evidence. Instead it purports to dispose of an extensive record, replete with citation of applicable authority, by a resort to some three paragraphs of gabbling and completely irrelevant drivel about the right of the Carrier to reclassify its tracks, with the somewhat pompous and inane platitude that this must be done "in good faith and for reasonable cause, and not upon whim or fancy." The substantive issue, as even a most casual review of the record should disclose to anyone claiming to have a modicum of perspicacity, is that the Carrier may not, through the indirect device of "reclassifying" tracks delegate work which the claimant employes have performed during the entire lifetime of the Agreement and delegate such work to employes not within the scope thereof.

R. H. Hack

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 11239, DOCKET TD-13174

The error in the Dissenter's thinking is fully demonstrated by this remark made in the dissent:

> "* * * The record makes it clear that the issue concerns the responsibility for directing train movements, and that work is demonstrably the same irrespective of what the tracks may be called. * * *"

The control of yard, secondary and industrial tracks on this Carrier has never been vested exclusively in Train Dispatchers and the Dissenter, of all people, should know this. The work of directing train movements on such tracks has been assigned to a host of people, including Trainmasters, Assistant Train-

masters, Special Duty Conductors, Yardmasters and Assistants, Block Operators and sometimes Clerks. Thus, the type of track operation, yard vis-a-vis Main, makes a very real difference in determining who has the right to control the movements. In this case, it was not main track operation and Train Dispatchers had no right under their contract to the work. The decision is entirely correct.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts